The no-conflict fiduciary rule and the rule against bias in judicial review

The no-conflict fiduciary rule and the rule against bias in judicial review: A comparison

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Abstract: This article explores the parallels between the fiduciary rule against conflicts of interest and the rule against bias in judicial review, with a view to providing novel normative insights into the purpose of the fiduciary no-conflict rule. Despite the significant doctrinal statements and judicial dicta highlighting the similarities between the two rules, the fiduciary literature has yet use this analogy to shed light on the purpose and function of the strict no-conflict fiduciary rule. This paper will argue that, analogous to the main purpose of the rule against bias, the fiduciary no-conflict rule aims to insulate the exercise of discretion from self-interest or other irrelevant considerations that may affect, directly or indirectly, the reliability and trustworthiness of the fiduciary's decision-making process.

Keywords: conflicts of interest; bias; fiduciary duties; judicial review of administrative action; natural justice

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1 Introduction

Fiduciaries and public officers have authority and discretion over the interests of others. In both cases, the exercise of discretion is constrained by strict rules against conflicts of interest and bias. The themes underlying the established rationales and objectives of these rules are similar: protection of the decision-making process against the risk of defective judgment, protection of the public confidence in the fiduciary relation or public office, and deterrence of the temptation of abuse discretion. Both areas use the reasonable man's perception of a real possibly of conflict of interest as a benchmark for measuring compliance with these rules.

Over time, public law refined its approach to the optimal level of public confidence that the rule against bias should instil, as well as the precise element on which appearances of integrity and public confidence are focussed. On the former matter, it gradually recognised that public confidence cannot be measured against the opinion of an overly suspicious observer. Therefore, the language of the standard for measuring integrity progressed from mere suspicion to a real possibility of bias, as perceived by the fair-minded and informed observer. The change in language was accompanied by a change in approach to presumed bias and automatic disqualification for direct pecuniary interests, which shifted from the

'smallest' or 'slightest' pecuniary interest that could upset a suspicious observer to an interest that could realistically affect the decision-making process and outcome. Following this development, an increasingly prominent argument questions the utility of the doctrine of presumed bias and automatic disqualification, suggesting that these cases should be included under apparent bias, as measured by the fair-minded and informed observer standard. On the latter matter, judicial review literature increasingly recognises that the standard of fair-minded and informed observer qualifies the concept of relevant public confidence by limiting objectionable conflicts to those that pose a real risk of defective judgments and inaccurate outcomes. In other words, it is acknowledged that the rule against bias primarily protects public confidence in the reliability of the decision-making process, rather than the public confidence in judicial and administrative decision-making *in abstracto*.

In comparison, the concept of conflict of interest is underdeveloped in fiduciary law. The standard by which potential fiduciary conflicts of interest are identified is analogous to the public law one, in terms of language and substance. What the conflict entails, however, is worded differently. Fiduciary literature and caselaw refer inconsistently to conflict between the individual interests of the fiduciary and beneficiary, or conflict between fiduciary's interest and his 'duties' or 'duty'. Little emphasis is placed on the relation between extraneous interest and defective decision-making process. De-coupling the extraneous interest from proper exercise of judgment has the undesirable consequence of making possible the argument that the no-conflict rule should be relaxed by removing fiduciary liability where the fiduciary demonstrably acted in good faith and the decision or transaction was fair to the beneficiary. A follow-up consequence is that the usual arguments against such relaxation are unconvincing: they are based on an imprecise and antiquated understanding of the rationale for the strictness of the no-conflict rule, namely discouraging rogue fiduciaries from defrauding their beneficiaries. This justification is too blunt in several ways. First it assumes a homogeneity of incentives in those receiving the disciplining signal. Second, it does not offer a satisfactory explanation of why interfering personal interests are a critical danger for fiduciary relations, even when the fiduciary's good faith and integrity are not contested, and when the outcome of impugned decision ostensibly advances the interests of the beneficiary.

This paper argues that fiduciary law theory could benefit from a more sophisticated understanding of the content and purpose of the no-conflict rule. The fair-minded and informed observer standard applied in judicial review of administrative decisions provides helpful comparative insights. By focusing on the real risk of unreliable or biased decision-

making process, the public law standard underscores that the decision-maker's personal interests are detrimental mainly because they affect the reliability of judgment in ways that are unpredictable and difficult to observe or measure, and not because the decision-maker is consciously motivated to defraud or harm the subjects of his discretion. An analogous emphasis on the interaction between interest and exercise of judgment could clarify the purpose of the fiduciary no-conflict rule and help courts in assessing the existence of fiduciary duties in new contexts. Too often courts address this matter using the vague language of trust and confidence that the beneficiary reposed in the fiduciary and that the courts must protect, without a careful investigation into whether the impugned decision involved the exercise of judgment on the interests of another. It could also provide a more palatable argument for why the no-conflict rule should not be relaxed in the fashion mentioned above. Good faith and the outcome of the decision are irrelevant not because ostensibly innocent fiduciaries must be punished *pour encourager les autres*,[1] but because a conflicting interest biases the judgment process irrespective of the decision-maker's desire to resist it and in ways that cannot be easily inferred from the outcome of the decision.

Before making these normative statements about the relevance of the analogy between the two rules, two preliminary matters must be addressed. First, are the two doctrines really comparable? Does the public-private law divide preclude any meaningful comparisons? Second, is the focus on judgment and decision-making process present in the public law rule against bias, but nearly absent from the private law fiduciary no-conflict rule, an impediment to the analogy? In other words, is there an analogous judgment process present in private law fiduciary relations, that could underpin the analogy? Related to this matter, should the rule against bias be understood as relating directly to the protection of public confidence in the public office, or with the respect of the autonomy and dignity of the subjects of the discretion, without interposing its relation to the decision-making process as a means to the protection of public confidence?

The paper will suggest the following answers. Regarding the first preliminary matter, it will make the case that the two doctrines are comparable, by invoking previous supporting views[2] and novel historical insights.[3] Regarding the second preliminary matter, it argues that a focus on the reliability of judgment is correct. Both rules regulate the exercise of discretion

[1] See Remus Valsan, "Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment" (2016) 62:1 McGill Law Journal 1 at 1-2.
[2] Section 2.
[3] Section 3.

over another's interests and use similar language that points to a shared central concern with the quality of the mind of the decision-maker. Fiduciary law admits, albeit with insufficient clarity, the centrality of judgment, discretion, and authority as indicia for the existence of fiduciary relations.[4] Whether some of the rules and duties governing the exercise of judgment, discretion and powers (such as the duty to promote the best interests of the beneficiary, the duty exercise a power within its objective scope and for the purpose for which it was granted, the duty to take into account relevant considerations and exclude irrelevant ones, the duty not to fetter discretion, the duty to act in good faith, the duty not to act capriciously or irrationally, or the duty of skill, care and diligence) are fiduciary or not is an important and highly debated question of fiduciary law.[5] For the purposes of this article, however, it is not essential to engage with it in detail. It is sufficient to note that some, or all, of these duties are binding on fiduciaries, involve exercise of judgment and discretion, and are thus at risk of improper performance when an actual or potential conflict of interest arises.

As regards the methodology, the paper draws mainly on British primary and secondary sources.[6] At times, the research draws on comparative insights from Australia, Canada and the United States. Nevertheless, the main insights of the paper are applicable to any other jurisdiction that recognises fiduciary duties or aims to introduce this concept. By highlighting the connection between self-interest or other vitiating factor and exercise of discretion over the interests of others, the paper conceptualises fiduciary duties and fiduciary relations using fundamental legal concepts that are stripped of historical connections with the English common law, thus being relevant to a wider comparative audience.

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[4] Section 5.

[5] For a detailed discussion of the application of these duties to fiduciary and non-fiduciary powers see Gerain Thomas, *Thomas on Powers*, 2nd ed (Oxford: Oxford University Press, 2012) Chapters 8-10. See also Lionel Smith, 'Prescriptive Fiduciary Duties' (2018) 37:2 University of Queensland Law Journal 261 (investigating the fiduciary nature of several prescriptive rules and duties governing the exercise of discretion, such as the duty of care and skill, the duty to exercise the powers for proper motives, and the duty of disclosure); Lionel Smith, 'Aspects of Loyalty' (2017), available at SSRN: https://ssrn.com/abstract=3009894 (suggesting that the duty of care, skill and diligence and the duty of good faith may be regarded as fiduciary duties); The Hon Dyson Heydon QC, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20:10 Trusts & Trustees 1006 (arguing against the dominant narrow view of fiduciary duties, which limits these duties to the no-conflict and no-profit rule); Rebecca Lee, 'In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis' (2007) 27:2 Oxford Journal of Legal Studies 327 at 337-338 (stating that fiduciary duties include "a (fiduciary) obligation to act solely towards the enhancement of the beneficiary's interests, which obligation in neither proscriptive nor prophylactic, but prescriptive and directional"); Geraint Thomas, 'The Duty of Trustees to Act in the 'Best Interests' of Their Beneficiaries' (2008) 2 Journal of Equity 177 (arguing that trustees are under a foundational fiduciary duty to act in the best interests of their beneficiaries, which requires them to exercise their best efforts in pursuit of the best possible result for their beneficiaries).

[6] There are no significant differences between the English and Scots law on the fiduciary no-conflict and no-profit rules (Law Commission. 2013. 'Fiduciary Duties of Investment Intermediaries: A Consultation Paper', para. 1.19). Following *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, the tests for apparent bias in Scotland and England are aligned terminologically and substantively (*ibid*. at [103]).

Several further caveats are apposite. 'The rule against bias' and 'the *nemo iudex* rule' are used interchangeably to refer to judicial review of administrative decisions for conflicts of interest. The rule against bias is discussed only in relation to the matter of impartiality of the decision-maker, understood as personal interests, connections or predispositions affecting the state of mind of the decision-maker and raising reasonable doubts about his objectivity. The issue of independence, in the sense of structural and institutional arrangements aimed to ensure impartiality (such as a public body's constitution) is of secondary relevance and therefore is omitted.[7] Systemic bias, denoting inclinations and predispositions resulting from working within a particular organisation[8] is another potentially relevant concept that is not covered, given its closer affinity to the issue of independence. The concept of public decision-maker or public official are used synonymously and denote judicial or administrative decision-makers whose decisions are amenable to judicial review.[9] Since the core tenets of the rule against bias apply relatively uniformly across the two categories,[10] it is not necessary for the purpose of this paper to engage with the slight contextual differences.

The paper builds on previous research comparing administrative and fiduciary discretions more generally, and the rule against bias and the fiduciary no-conflict rule in particular.[11] It shows that the case for analogy between the two no-conflict rules is supported by compelling arguments. The paper does not advocate a transplant of the fair-minded and informed observer standard into fiduciary law. It notes the similarities between the two rules and their associated standards for determining potential or apparent conflicts of interest, and makes the case that the similarity extends to a shared core rationale of protection against the risk of deficient judgment process. Transfers between the two fields could indeed be

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[7] Impartiality and independence are related but distinct concepts. See *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781 at [38], per Baroness Hale of Richmond; Matthew Groves, 'The Rule against Bias' 39 *Hong Kong Law Journal* (2009) 485 at 488.

[8] Dennis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Oxford University Press, 1996) 438-439.

[9] Examples of judicial decision-makers include judges, jurors, lay magistrates or members of a tribunal. Administrative decisions-makers include ministers, local councillors or officers and employees of public bodies (Jonathan Auburn, Jonathan Moffett and Andrew Sharland, *Judicial Review: Principles and Procedure* (Oxford: Oxford University Press, 2013) 8.03.

[10] Groves (n 7) at 486.

[11] On this issue, the paper draws on Matthew Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias' *Public Law* 58 (2008) 83 (describing the comparison between the fiduciary conflict principle and the doctrine of bias as "a worthwhile endeavour"). This paper agrees with Conaglen's conclusion that the two rules have significant substantive similarities, but adopts a significantly different view on the meaning and rationale of fiduciary conflicts of interest. Conaglen equates fiduciary conflicts with opposition between extraneous interest and non-fiduciary duties, thus downplaying the significance of judgment. He advocates the deterrence of temptation rationale for the strict fiduciary duties, an approach critiqued in this paper.

dangerous,[12] although not unprecedented,[13] and should be explored only following rigorous and detailed consideration of the doctrines involved and the contexts within which they operate.[14] More generally, the article does not aim to draw and exhaustive comparison between the legal regimes governing the exercise of fiduciary discretions and the exercise of judgment by public decision-makers. Thus, matters such as the principal-agent problem, the doctrine of reasonableness, the relevance of disclosure and informed consent, or the availability of particular remedies (such as rescission for mistake), while relevant to a broader comparison between the two areas, are not directly relevant to the scope of this paper and consequently will not be addressed.

2 Comments and dicta supporting the analogy between public and private law rules on the exercise of discretion

Fiduciary duties arise in legal relations where one party undertakes to perform an act or a service in the interests of another (usually the other contracting party), and acquires discretionary power or authority to decide on the best means to serve this purpose.[15] Fiduciary relations are pervasive across private and public law. They arise in established (or *per se*) contexts, such as agent-principal, trustee-beneficiary, solicitor-client or director-corporation. All contexts in which fiduciary duties have been analysed involve loyalty, in the sense of strict adherence to the promotion of the other-regarding interests. Although centuries old, fiduciary duties continue to be surrounded by controversies regarding their nature and function. Numerous authors have attempted to elucidate these points by comparing and contrasting the private law and the public law contexts in which they arise. This section will highlight the main arguments and statements supporting a close analogy between fiduciary discretions in private and public law.

Before reviewing the supporting precedents, it should be noted that analogies between private law and public law rules on exercise of discretion are at times met with circumspection or simply rejected. In *Abacus Trust v Barr,* for instance, Lightman J

[12] James Goudkamp, 'The Rule against Bias and the Doctrine of Waiver' *Civil Justice Quarterly* 26 (2007) 310 at 327.
[13] See the discussion of *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 4 All ER 639 in the following section.
[14] Conaglen (n 11) at 61.
[15] Remus Valsan, 'Fiduciary Duties' in Alain Marciano and Giovanni Ramello, eds, *Encyclopedia of Law and Economics* (New York: Springer-Verlag) online publication available at https://doi.org/10.1007/978-1-4614-7883-6_698-1

acknowledged a limited scope for analogy, but warned that there are "critical differences between public, or administrative, law and private law proceedings".[16] In *Pitt v Holt*, Mummery LJ commented that analogies between liability in private law for breach of fiduciary duties and judicial review of discretions in public law "are unhelpful and unnecessary". [17] The authors of *Underhill and Hayton Law Relating to Trusts and Trustees* warn that allowing an analogy between review of trustees' of powers and review of administrative discretion will open the gates to introducing incompatible administrative law principles into trust law.[18] Similarly, Davern warned that the mere coincidence of terminology between exercise of discretion by trustees and public authorities is an insufficient basis on which to draw substantive similarities between the two areas.[19] From the public law side, Goudkamp argued against transplants into judicial review of private law concepts, such as waiving the right to abject to a conflict of interest or bias.[20]

Other authors adopted a more nuanced view. Fox-Decent used the private law fiduciary theory to construct a vision of the state as fiduciary, exercising public powers for the purpose of securing and administering legal order. However, he pointed out that an important difference between the two fields resides in the beneficiary of the fiduciary duties: while private law fiduciaries must act for the benefit of discrete beneficiaries, in public law fiduciary duties are owed to a wide range of beneficiaries, from the public at large to an individual who appeals to an administrative tribunal.[21] Nevertheless, he further noted, public decision-makers could be regarded as a fiduciaries owing duties of fairness and reasonableness to the individuals subject to their powers and to the public at large, instead of the traditional private law fiduciary duties of loyalty. This view is supported by Miller and Gold who distinguish between fiduciary service mandates, which involve administration of the affairs or property of identifiable persons, and fiduciary governance mandates, which involve administration for particular private or public law purposes.[22]

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[16] *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2003] Ch 409 at [29]-[30].
[17] *Pitt & Anor v Holt & Anor* [2011] EWCA Civ 197 at para. 235
[18] David Hayton, *ed*., *Underhill and Hayton Law Relating to Trusts and Trustees*, 18th ed. (London: LexisNexis, 2010) 904.
[19] Raymond Davern, 'Impeaching the Exercise of Trustee's Distributive Discretions: 'Wrong Grounds' and Procedural Unfairness' in David J. Hayton, *ed*., *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002) 437 at 454.
[20] Goudkamp (n 12) at 326-327.
[21] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2012) 152.
[22] Paul B. Miller and Andrew S. Gold, 'Fiduciary Governance' *William & Mary Law Review* 57 (2015) 513. In governance relations fiduciaries are engaged to promote certain abstract purposes, as opposed to fiduciary service mandates, which involve the administration of interests of discrete beneficiaries.

At the other end of the spectrum, numerous arguments can be found in favour of the analogy. However, supporting observations tend to be made at a high level of abstraction, often accompanied by cautionary statements about the primacy of context and underlying idiosyncratic values. The judicial dicta in support of the analogy are numerous. In the recent decision in *Braganza v BP Shipping Ltd*,[23] the UK Supreme Court confirmed that contractual discretions (category which includes many instances of fiduciary discretions) and public law discretions are governed by analogous rules, which justifies the transplant into private law of the doctrine of *Wednesbury* unreasonableness developed in judicial review of administrative action.[24] Lady Hale, writing the majority opinion, highlighted the "obvious parallel" between cases where a contract assigns a decision-making function to one of the parties and cases where a statute assigns a decision-making function to a public authority.[25] She concluded that both limbs of the *Wednesbury* test apply to contractual discretions via a contractual implied term.[26] The reasonableness test imposes a duty "to exclude extraneous considerations [and]… to take into account those considerations which are obviously relevant to the decision in question."[27] However, Lady Hale stopped short of a wholesale transplant into private law of the *Wednesbury* doctrine by conceding that "it is unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action."[28]

The transplant of *Wednesbury* unreasonableness doctrine is supported by a long track record of comments and dicta highlighting the similarities between the two instances of exercise of discretion. In *Sherarson v Maclaine*, Webster J rejected the premise that the public law rules of judicial review and private law rules on review of powers are different, and the ensuing assumption that the former cannot be imported into the later: "that premise, and the assumption to which it leads, is false".[29] In *Edge v Pensions Ombudsman*, Chadwick LJ, writing the unanimous decision, highlighted the terminological similarity of the concepts used in the review of discretions in private and public law:

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[23] *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 4 All ER 639.
[24] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Although *Braganza* did not involve the exercise of a fiduciary discretion, the *Wednesbury* test applies *a fortiori* to fiduciary contractual or non-contractual discretions.
[25] *Ibid*. at [19].
[26] *Ibid*. at [30]-[32].
[27] *Ibid*. at [29].
[28] *Ibid*. at [32]. On the facts of the case, Hale LJ concluded that the decision-maker (BP) failed the Wednesbury test by reaching a decision without taking certain relevant matters into account (*ibid*. at [42]).
[29] *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570 at 625.

> "It seems to us no coincidence that courts, considering the exercise of discretionary powers by those to whom such powers have been entrusted (albeit in different contexts), should reach similar and consistent conclusions; and should express those conclusions in much the same language."[30]

Similarly, in *Equitable Life Assurance Society v Hyman*,[31] after cautioning against false analogies,[32] Lord Woolf MR noted the "marked similarities"[33] between private fiduciaries and public authorities, the latter being "in very much the same position as they would be if they had fiduciary powers conferred upon them."[34] In *Socimer v Standard Bank*, Rix LJ argued that the *Wednesbury* unreasonableness test applies to contractual discretions, which are governed

> "as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality... Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness."[35]

The parallels between fiduciary and public discretions are also recognised by academic commentators. In his treatise on private law powers, Thomas observed that the principles governing the exercise of powers or discretions by trustees are similar to the public law principles applicable to the exercise of discretion by public authorities. Thus, a public authority must exercise discretion within its objective limits, in good faith, having regard to all relevant considerations and without being swayed by irrelevant considerations.[36] Thomas concluded that, contextual differences aside, "the underlying principle of review remains common to all cases, namely that it is some flaw in the decision-making process itself that may be open to challenge and not the merits of the decision itself."[37] Beatson suggested that,

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[30] *Edge v Pensions Ombudsman* [2000] Ch 602 at 628. However, the Court of Appeal declined to consider the analogy further: "[It is] unnecessary to consider, in the present case, how far an analogy between the principles applicable in public law cases can or should be pressed in the different context of a private pension scheme." (*ibid*. at 630).
[31] *Equitable Life v Hyman* [2000] EWCA 4; [2002] 1 AC 408.
[32] *Ibid*. at [17].
[33] *Ibid*.
[34] *Ibid*. at [18].
[35] *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304. See also *Byng v London Life Association Ltd* [1990] Ch. 170; *Second Consolidated Trust v Ceylon and Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567.
[36] Geraint W. Thomas, *Thomas on Powers* (London: Sweet & Maxwell, 1998) 36.
[37] *Ibid*. at 367.

in certain contractual contexts, contractual discretions are subject to "common law principles of procedural propriety (ie fairness or natural justice), *Wednesbury* reasonableness (or rationality), bona fides, propriety of purpose, and relevancy."[38] Oliver remarked that the no-profit rule binding on trustees "provides a parallel with the rule against bias in judicial review"[39] and argued that the similarities between the two fields show that both categories "form part of a legal framework for the control of power which is not by any means confined to public law."[40] More recently, in a detailed analysis of the no-conflict rule and the rule against bias, Conaglen showed that the fiduciary rule on conflicts of interest and the rule against bias share common features with regard to methodology, underlying rationales and remedial considerations.[41]

Support for the analogy comes from the public law side as well. In *Prescott v Birmingham Corporation*[42] Jenkins LJ, stated that local authorities owe to local tax-payers fiduciary duties analogous to those of trustees, and thus cannot use public funds to subsidise a scheme for free travel for senior citizens.[43] In *Bromley London Borough Council v Greater London Council*,[44] a case which also involved the powers of a local authority to reduce transport fares, Lord Wilberforce referred to "a duty of a fiduciary character to its ratepayers"[45], which the local authority breached by failing to hold the balance between the transport users and the ratepayers.[46] In *Charles Terence Estates Ltd v Cornwall Council*,[47] Kay LJ reviewed these cases and concluded that "there is no doubt that this line of authority establishes that some decisions of local authorities will amount to a breach of fiduciary duty or of a duty analogous to a fiduciary duty."[48]

Similar statements can be found in other jurisdictions as well. In Australia, Finn observed that, given the close resemblance between a fiduciary office-holder[49] and the public

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[38] Jack Beatson, 'Public Law Influences in Contract Law' in Jack Beatson and Daniel Friedman, *eds*, *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995) 263 at 269.
[39] Dawn Oliver, 'Review of (Non-Statutory) Discretions' in Christopher Forsyth, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 307 at 310.
[40] *Ibid* at 312.
[41] Conaglen (n 11) at 58. However, he acknowledged that the bias law concepts of independence and impartiality do not have direct equivalents in fiduciary law (*ibid*. at 77-78).
[42] *Prescott v Birmingham Corporation* [1955] 1 Ch 210; [1954] 3 All ER 698
[43] *Ibid*. at 235-236.
[44] *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.
[45] *Ibid*. at 815B.
[46] *Ibid*. at 820D. Similarly, Lord Diplock concluded that the scheme was "a breach of the fiduciary duty… ultra vires and therefore void" (*Ibid*. at 830F).
[47] [2012] EWCA Civ 1439 [2013] 1 WLR 466.
[48] *Ibid*. at [17]. However, central government does not owe fiduciary duties to the body of taxpayers (Peter Cane, *Administrative Law*, 5th ed. (Oxford: Oxford University Press, 2011) 176).
[49] Established fiduciary positions (especially trusts) are often described as offices. See e.g. Gary Watt, *Trusts and Equity*, 7th ed. (Oxford: Oxford University Press, 2016) 321: ("Insistence on exemplary fiduciary propriety

official, the legal regime of fiduciary powers reflects "in a very large measure" the judicial review of administrative decisions.[50] In another text, he noted that "in the realms of government… fiduciary power is the most pervasive, the most intense."[51] More recently, Finn stated that, under Australian law, there is no principled reason against treating public officers and employees as fiduciaries, bound by the same proscriptive no-conflict and no-profit rules as their private law counterparts.[52] Sir Anthony Mason wrote that administrative law "from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers."[53] Similarly, Ryan underlined that "there can be little room for controversy [regarding] the close analogy between the role of the modern public official and of a fiduciary."[54] In Canada, Macdonald noted that the administrative decision-maker "acts no differently than a trustee administering a trust indenture."[55] Fox-Decent argued that, given the "obvious similarity" between fiduciary and public powers, fiduciary theory is helpful in understanding the most important doctrines and practices of administrative law.[56] Furthermore, a growing body of literature, developed mainly by North-American scholars, uses this analogy to create a fiduciary theory of government, where political discretion is constrained through rules of judicial review modelled after private law fiduciary duties.[57] The

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encourages other persons in positions of trust to fulfil requirements of their office."); Thomas Lewin, *A Practical Treatise on the Law of Trusts and Trustees*, 2nd American ed. (Philadelphia: T & J W Johnson, 1858) 454: ("[I]f the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty").

[50] Paul D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 6. See also *ibid*, at 14 ("This resemblance is not an inconsequential one… [T]he actual obligations imposed on a fiduciary in the exercise of his discretions mirror to a large degree the obligations imposed on the public officer in exercising his."); Paul D. Finn, 'Public Officers: Some Personal Liabilities' *Australian Law Journal* 51 (1977) 313 (noting that public officers who are neither employees nor Crown servants are subject to public law rules that are analogous to fiduciary law). Sir Robert Walker, 'The Limits of the Principle in Re Hastings-Bass' *King's Law Journal* 22 (2002) 173 at 174 ("There is an obvious and unsurprising similarity between the grounds on which a decision by trustees may be attacked and the grounds on which official decision-making is subject to control by judicial review").

[51] Paul D. Finn, 'The Forgotten "Trust": The People and the State' in *Equity: Issues and Trends* (Annandale, NSW: Federation Press, 1995) 131 at 132.

[52] Paul D. Finn, 'Fiduciary Reflections" in Paul Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Sydney: The Federation Press, 2016) 356 at 360.

[53] Sir Anthony Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World' *Law Quarterly Review* 110 (1994) 238 at 247.

[54] K. W. Ryan, 'Commentary' in *Equity: Issues and Trends* (Annandale, NSW: Federation Press, 1995) 152 at 152.

[55] Roderick Macdonald, 'On the Administration of Statutes' *Queen's Law Journal* 12 (1987) 488 at 493.

[56] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2012) 151-152. See also Evan Fox-Decent and Evan J. Criddle, 'The Fiduciary Constitution of Human Rights' *Legal Theory* 15 (2009) 301 (arguing that a state's assumption of sovereign administrative powers places it in a fiduciary relationship with its people, and human rights emanate from this fiduciary relationship).

[57] See e.g. Evan J. Criddle, 'Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking' *Texas Law Review* 88 (2010) 441 (drawing an analogy between federal officers and private law fiduciaries); Evan J. Criddle, 'Fiduciary Foundations of Administrative Law' *UCLA Law Review* 54 (2006) 117 (stating that the core fiduciary law concepts of entrustment, residual control and fiduciary duty increasingly

core insight that this political theory borrows from private law fiduciary theory is "that the use of discretionary power over the material, practical and legal interests of others must be constrained by obligations meant to align the interests of agents and principals".[58] This view is supported by judicial dicta. In *Driscoll v Burlington*, for instance, Vanderbilt CJ of the Supreme Court of New Jersey observed that public officials "stand in a fiduciary relationship to the people whom they have been elected or appointed to serve" and "are under an inescapable obligation to serve the public with the highest fidelity."[59]

These examples show that there is extensive judicial and doctrinal support for a close analogy between fiduciary positions and public offices. By definition, both roles involve exercise of authority and discretion that affect or promote other-regarding interests and purposes. In both cases, discretion is constrained by analogous procedural rules aimed to prevent abuse, unreasonableness and the risk of interference of personal interest. In both cases, the procedural rules guiding the exercise of discretion serve an important instrumental function, by ensuring that the decision-maker's mind is properly applied to the exercise of discretion at hand, and is not encumbered in a way which will prevent him from reaching the right outcome. The similarities between the two doctrines are significant, and go beyond mere coincidence of terminology. A brief historical insight into the evolution of some of the concepts behind the two rules provides additional arguments in support of this view.

3 Historical insights: natural justice, *nemo iudex in causa sua* and *auctor in rem suam*

The similarities between the rules governing the exercise of discretion in both fields may be justified from a historical perspective as well. Oliver surmised that the conceptual similarities

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capture the "deep structure" of administrative law and the transition from "the glacial evolution of constitutional precepts to the flowering of statutory standards for agency discretion". *Ibid* at 136); Benjamen Franklen Gussen, 'The State Is the Fiduciary of the People' *Public Law* (2015) 440 (describing the relationship between the state and its subjects as analogous to the private law trust and arguing for an overarching fiduciary duty of the state deriving from the nature of social relations and the high ethical standard of conduct expected from public servants); D. Theodore Rave, 'Politicians as Fiduciaries' *Harvard Law Review* 126 (2013) 671 (making the case for treating political representatives as fiduciaries, subject to a duty of loyalty); David L. Ponet and Ethan J. Leib, 'Fiduciary Law's Lessons for Deliberative Democracy' *Boston University Law Review* 91 (2011) 1249 (discussing the application of private law fiduciary duties to elected political leaders). For a critical discussion of these theories in the US literature see Seth Davis, 'The False Promise of Fiduciary Government' *Notre Dame Law Review* 89 (2014) 1145.

[58] Ethan Lieb, David Ponet and Michael Serota, 'Mapping Public Fiduciary Relationships' in Andrew S Gold and Paul B Miller, *eds*, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) 388 at 388.

[59] *Driscoll v Burlington – Bristol Bridge* 86 A2d 201 at 221 (1952). See also *Metro Wash Airport Auth v Citizens for the Abatement of Aircraft Noise Inc* 501 US 252 at 272 (1991) (the administrative state is "in its own way … the people's … fiduciary for certain purposes.").

between equitable and judicial review of exercise of powers could be explained by Lord Greene's extensive influence in both areas. In her view, Lord Greene, an established trust and equity lawyer, drew "clearly from the principles applied by equity in controlling the exercise of discretion by trustees and company directors"[60] to develop the law on judicial review, notably the *Wednesbury* unreasonableness test.[61] However, as Conaglen observed, the relevant principles have much older origins.[62] Earlier connections may be found in the decisions of Lord Eldon, who was instrumental in the development of the fiduciary conflict doctrine as well as the notion of public trust. Lord King LC may be another connecting point, given his seminal fiduciary law decision in *Keech v Sandford*[63] and his concern with unauthorised profits from public office.[64]

An aspect that up to now has received little attention is the principle against being judge in one's own cause, as a shared antecedent of the two modern rules. In current legal theory, the maxim *nemo iudex in causa sua* is regarded as one of the pillars of natural justice.[65] Until the eighteenth century, natural justice lacked a precise meaning - it was often used interchangeably with natural law, natural equity, eternal law, the laws of God, and other similar expressions,[66] to refer to "the natural sense of what is right and wrong."[67] Subsequently, natural justice acquired a more restricted meaning. It has been used as a compendious phrase to refer to two main rules governing the exercise of discretion by judicial and quasi-judicial decision-makers: *nemo iudex in causa sua*, or the rule against bias, addressing conflicts of interest, and *audi alteram partem*, or the fair hearing rule, addressing opportunity to be heard before a making a decision.[68] These rules were first applied to proceedings in courts of justice, which presupposed a tripartite process involving two opposing litigants and a neutral third party adjudicator.[69] By the 1960s, the safeguards of natural justice were extended to contexts that did not involve a tripartite setting, such as

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[60] Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge: Cambridge University Press, 1999) 21-22.
[61] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
[62] Conaglen (n 11) at 65.
[63] *Keech v Sandford* (1726) Sel Cas Ch 61.
[64] Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Alan Rodger, *eds*, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 577; Conaglen (n 11) at 65.
[65] Hedley H. Marshall, *Natural Justice* (London: Sweet & Maxwell, 1959) 5; Paul Jackson, *Natural Justice*, 2nd ed. (London: Sweet & Maxwell, 1979) 5-7.
[66] Marshall, *supra* 65 at 6.
[67] *Voinet v Barrett* (1885) 55 LJQB 39 at 41, per Lord Esher MR.
[68] *Kanda v Government of Malaya* [1962] AC 322 at 337, per Lord Denning MR; Michael Supperstone, James Goudie and Paul Walker, *Judicial Review*, 4th ed (London: LexisNexis, 2010) 328.
[69] Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge: Cambridge University Press, 2016) 344.

decisions by administrative and other public decision-makers, whether judicial or not,[70] or exercise of discretion in certain private law contexts.[71] As the bias and fair hearing rules expanded to include a great range of decision makers, they became more flexible. Courts and commentators repeatedly stressed that the application of the rules must take into account the particular features of the decision-maker and wider circumstances to which they are applied.[72] Nevertheless, it is recognised that the rule against bias is less context-sensitive than the fair hearing rule.[73]

The recent expansion of the rule against bias across public and private law contexts[74] is more a rediscovery of its universal application than a modern innovation. Early sources describe it as "a general rule of law"[75], "founded upon nature itself"[76] and known to all legal systems. It is commonly thought that it reached its peak in the early seventeenth century, when being a judge in one's own cause was regarded by English courts as "against right and justice and against natural equity."[77] In *Dr Bonham's Case*, Chief Justice Coke went so far as to say that the court could declare an act of Parliament void if it made a man a judge in his own cause, or was otherwise "against common right and reason".[78] In *Mersey Docks Trustees v Gibbs,* Lord Blackburn asserted that "it is contrary to the general rule of law, not only in this country [England] but in every other, to make a person judge in his own cause."[79] By the

[70] *Ibid*. at 345; *O'Reilly v Mackman* [1983] 2 AC 237 (HL); *R v Chief Constable of South Wales Ex p Thornhill* [1987] IRLR 313 (CA); *R v Panel on Take-overs and Mergers Ex p. Guinness Plc* [1990] 1 QB 146; *R v Holderness BC Ex p James Roberts Developments Ltd* (1993) 66 P & CR 46; *R v Secretary of State for the Environment Ex p Kirkstall Valley Campaign Ltd* [1996] 3 All E.R. 304.

[71] The private law contexts include trade unions, professional bodies, or private clubs (Madeleine Cordes, *Shackleton on the Law and Practice of Meetings*, 14th ed. (London: Sweet & Maxwell, 2017) at 10-02. In these contexts, the need to observe the principles of natural justice is often found to arise via an implied term in a contract between the parties (*ibid*. at 10-03).

[72] Cane (n 69) at 345; Groves (n 7)at 486.

[73] Cane (n 69) at 346. An aspect of this more uniform application is the single test used to determine the incidence of bias, that of the fair-minded and informed observer.

[74] See examples mentioned in Section 2 above.

[75] Steward Kyd, *A Treatise on the Law of Awards* (Dublin: J. Stockdale, 1791) 42 ("It is a general rule of law, founded on the first principles of natural justice, that a man cannot be judge in his own cause.")

[76] John Erskine, *An Institute of the Law of Scotland*, vol.1 (Edinburgh: John Bell, 1773) 45 ("It is a rule founded on nature itself, that no man ought to judge in his own cause; and it holds, though the judge have only a partial interest in the cause…").

[77] *Day v Savadge* (1614) Hob 65; 80 ER 235 at 235.

[78] *Dr Bonham's Case* 8 Co Rep 113b at 118a. See also *Earl of Derby's Case* (1613) 12 Co Rep 114; 77 ER 1390; *Brookes v Earl of Rivers* (1655-69) Hardes 503; 145 ER 569; *Wood v Mayor & Commonalty of London* (1701) Holt K.B. 396. See also Sir William Wade and Christopher Forsyth, *Administrative Law*, 11th ed. (Oxford: Oxford University Press, 2014) 376; Groves (n 7) at 487; George Devenish, 'Disqualifying bias. The Second Principle of Natural Justice - The Rule against Partiality or Bias (Nemo Iudex in Propria Causa)' *Journal of South African Law* 3 (2000) 397 at 397.

[79] *Mersey Docks Trustees v. Gibbs*, (1886) LR 1 HL 93 at 110. See also *Gibbons v Bishop of Cloyne*, Holt 599 at 600 ("Lastly, here the bishop was both judge and party, which is not to be allowed by any law in the world").

1860s, the requirement that judges act without any real likelihood of bias became unequivocally established.[80]

In private law relations, the *nemo iudex* maxim was often used to convey the prohibition of self-help. The interdiction to act as judge in one's cause meant that no person was allowed to take justice in his own hands. According to Yale, the current Latin formulation of the prohibition of being judge in one's own case was coined by Sir Edward Coke.[81] Coke laid down this phrase in his comments on section 212 of Littleton, concerning self-help for damages caused by straying cattle, where commented that "it is against reason, that if wrong be done [to] any man, that he thereof should be his own judge."[82] In other cases, the principle was used to express the idea that an interested party is never a competent decision-maker in a matter involving judgment or discretion. In *Hall v Harding*, for instance, it was held that the number of cattle that a commoner is allowed to pasture is a matter that requires exercise of judgment, which cannot be determined by another commoner who has an interest in the matter.[83] Lord Stair explained that, in decisions requiring the application of the general principles of the law of nature to particular cases, "the bias and corruption of interest" may lead to errors of judgment.[84] Similarly, Locke stated that ignorance and bias of self-interest prevent humans from learning and applying the law of nature to particular cases.[85]

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[80] Harry Woolf *et al*., *De Smith's Judicial Review*, 7th ed. (London: Sweet & Maxwell, 2013) 11-004 - 11-005. Conaglen (n 14) at 72.

[81] David E.C. Yale, 'Iudex in Propria Causa: An Historical Excursus' *Cambridge Law Journal* 33 (1974) 80 at 80.

[82] Sir Edward Coke, *The First Part of the Institutes of the Law of England*, vol. 1, 15th ed. (London: E. and R. Brooke, 1794) 229. See also Jacob Giles, *A Treatise of Laws: Or, A General Introduction to the Common, Civil, and Canon Law* (London: T. Woodward, 1721) 315 ("The person letting to hire may expel his tenant by authority of the judge, before the term is expired. This must be by authority, if the tenant resisteth, for no man ought to judge in his own cause"); Sir Edward Coke, *The Second Part of the Institutes of the Law of England* (London: E. & R. Brooke, 1797) 102-103 ("*Aliquis non debet esse judex in sua propria causa*… [N]o private revence [should] be taken, nor any man by his owne arme or power revenge himselfe"). The language of no judge in own cause appears in *Doctor and Student* several times, as an argument against self-help in case of damages. See Christopher Saint German, *The Doctor and Student: Or, Dialogues between a Doctor of Divinity and a Student in the Laws of England*, 18th ed. (Dublin: James Moore, 1792) 124-125 ("I agree that he may not take upon him to be his own judge, and to come to his duty against the order of the law").

[83] *Hall v Harding* (1769) 4 Burr 2426 at 2431 ("It is unnecessary to give any opinion as to the commoner's right of distraining where the number is absolutely certain… [W]hen the question depends upon a collateral fact, or upon a matter of judgment, the party interested can never be a competent judge in his own cause.")

[84] James Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland,* 3rd ed., Book 1 (Edinburgh: G. Hamilton and J. Balfour, 1759) 9 ("[T]hough equity be very clear in its principles and its *thesi*, yet the deduction of reason further from the fountain, through the bias and corruption of interest, may make it more dubious in *hypothesi*, when it comes to the decision of particular cases in all their circumstances"). See also Johannes Sleidanus, *A Famouse Cronicle of Oure Time, Called Sleidanes Commentaries* (London: Ihon Daye, 1560) 61 ("Again not only the laws written, but also the law of nature printed in men's minds, shows that no man ought to be judge in his own cause. For we be all faulty and blinded with the love of our selves").

[85] John Locke, *Of Civil Government: The Second Treatise* (Rockville: Wildside Press, 2008) 76.

As these sources show, by the eighteenth century, the interdiction to be judge in one's own cause was an established legal principle applied in a variety of public and private law contexts. Despite its widespread application, there is little certainty about the core rationale behind this prohibition.[86] However, in certain contexts, a link can be observed between this prohibition and a fair and reliable exercise of discretion or judgment. The idea that personal interest affects the reliability or trustworthiness of judgment may have been associated with the Roman law equivalent of *nemo iudex*. Section 2.2 of the Theodosian Code, entitled "No person shall be judge in his own cause" (*Ne in sua causa quis iudicet*) states that this prohibition was established in 376 CE by a joint decree issued by emperors Valens, Gratian and Valentinian: "We decree with sweeping generalization that no person shall act as judge for himself."[87] The official interpretation of this text underlines that the reason why a person cannot be judge in a matter in which he is interested is the same reason that prohibits a person to be witness in a case where he has an interest: "Our regulation shall constrain all men that no man may be judge of his own case, because just as no man can testify for himself, so he cannot act as judge for himself."[88] One is hard pressed to find detailed explanations of the prohibition to testify for oneself in Roman law. More recent sources suggest that a personal interest in the testimony may bias the witness' judgment, rendering it unreliable and untrustworthy. In one of the earliest English treatises on the law of evidence, Sir Geoffrey Gilbert pointed out that the prohibition of being witness in one's own cause is justified by the fact that, due to the shortcomings of human nature, the testimony of a witness who has an interest in the outcome of the case is unreliable due to "the nature of human passions and actions".[89] Blackstone made similarly elusive comments on the prohibition of a spouse to

[86] According to Yale, the typical context in which the principle was applied in medieval times in common law concerned the validity of royal grants of jurisdictional franchise to various grantees, such as religious houses, boroughs, universities or individuals. The main question was whether the king could enable a man to decide a case in which he was concerned because he was lord of the franchise in which the cause of action arose. The main problem was not the proper exercise of judicial powers, but what judicial powers could be properly conferred or claimed (Yale (n 81) at 84-85).

[87] *The Theodosian Code and Novels and the Sirmondian Constitutions*, translated by Clyde Pharr (Princeton: Princeton University Press, 1952) 39-40. These provisions were restated in Justinian's *Code* 3.5.1: No one shall be judge in his own cause; and Justinian's *Digest* 22.5.10: No person is deemed to be a competent witness in his own cause.

[88] *Ibid.* at 40.

[89] Sir Geoffrey Gilbert, *The Law of Evidence*, 3rd ed. (London: His Majesty's Law Printers, 1769) 122-123 ("[T]he general rule is, that no man can be a witness for himself… [F]or men are generally so short-sighted, as to look at their own private benefit which is near to them, rather than to the good of the world, that is more remote; therefore from the nature of human passions and actions, there is more reason to distrust a biased testimony than to believe it.").

testify for the other spouse, noting that one of the reasons of this rule is that "it is impossible for their testimony [to be] indifferent".[90]

These texts offer conjectural evidence in support of the idea that the need to maintain the appearance of objective and unbiased judgment might have been one of the reasons behind the *nemo iudex* rule. The same could be inferred about the strict no-conflict fiduciary rule. The connection between *nemo iudex* and the fiduciary no-conflict rule can be conceptualised at two levels. At a general level, it is likely that *nemo iudex* influenced the early jurisprudence of the Court of Chancery as part of the broader set of principles of natural law or natural justice. As Joseph Story commented, early chancellors "acted upon principles of conscience and natural justice, without much restraint of any sort."[91] It can be contended that, when chancellors explained that a person in a fiduciary position cannot be in a situation of conflict of interest since no person can be judge in his own cause, they were invoking the need to ensure that fiduciaries' judgment is, and appears to be, reliable and unbiased. *York Buildings*, a foundational fiduciary law decision, links the two rules directly: "The ground on which the disability or disqualification rests [i.e. the rule against self-dealing], is no other than that principle which dictates that a person cannot be both judge and party." [92] In *Re Skeats's Settlement*, the donees of a fiduciary power granting them authority to appoint "any other person" as trustee exercised the power to appoint themselves. Kay J held that, since the power was fiduciary in character, the exercise of discretion was invalid based on "[t]he universal rule is that a man should not be judge in his own cause."[93]

At a more contextual level, *nemo iudex* can be connected with the fiduciary no-conflict rule via the *auctor in rem suam* concept. Scottish texts, in particular, trace the origins of the fiduciary no-conflict rule in the Roman law rule that prohibited a tutor or curator to be *auctor in rem suam*.[94] In Roman law, the expression was used to refer to a procedural incompatibility. If a suit arose between a tutor and his ward, the tutor could not stand in court

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[90] Sir William Blackstone, *Commentaries on the Laws of England: In Four Books*, vol. 1, 12th ed. (London: A. Strahan and W. Woodfall, 1793) 443 ("[I]t is impossible for their testimony [to be] indifferent…; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, '*nemo in propria causa testis esse debet*'").

[91] Joseph Story, *Commentaries on Equity Jurisprudence*, vol. 1, 14th ed. (Boston: Little, Brown and Co., 1918) 21. See also Sir Duncan Mackenzie Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge: Cambridge University Press, 1890) at 101; Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Farnham: Ashgate, 2010) 219-263.

[92] *York Buildings Company v Mackenzie* (1795) 8 Brown PC 42 at 63.

[93] *Re Skeats's Settlement* (1889) 42 Ch D 522 at 527. He added: "Naturally no human being can be imagined who would not have some bias one way or the other as to his own personal fitness." (*ibid*.)

[94] A popular early translation was "one who acts for his own behoof". See John Trayner, *Latin Phrases and Maxims: Collected from the Institutional and Other Writers on Scotch Law* (Edinburgh: W. Paterson, 1861) 32-33).

both in his name and as representative of the ward.[95] Until the second half of the eighteenth century, Scottish lawyers applied the *auctor in rem suam* principle solely in the context of the actions of tutors in connection with the estates of their wards.[96] Starting with the works of Erskine, this rule was expanded to any person occupying a fiduciary position. At the same time, the rule was no longer restricted to a procedural incompatibility. It was interpreted as encompassing a general interdiction of using such position for its holder's benefit, for the same reason as the interdiction to be judge or witness in one's own cause. Erskine commented that curators can be *auctores in rem suam* "no more than they can be judges or witnesses in their own cause."[97] Other sources confirm the association between the fiduciary no-conflict rule (expressed as *auctor in rem suam*) and the *nemo iudex* rule. Fraser, for instance made the similar point that a person occupying a fiduciary position is prohibited from engaging in transactions with himself, or be *auctor in rem suam*, just as no person can be judge in his own cause.[98]

Within the scope of this paper, only a cursory and fragmentary examination of the historical links between *nemo iudex* and the fiduciary no-conflict rule is possible. Nevertheless, this examination reveals that judges and commentators stated that fiduciary conflicts of interest are not allowed for the same reason as the interdiction to be *iudex in causa sua*, or to act *auctor in rem suam* (which is closely related to *nemo iudex*). The contexts in which these comparisons arose suggest that both served the purpose of preventing situations in which judgment appears to be unduly influenced by extraneous considerations, which, in turn, may have enabled fairer and more accurate decisions and strengthened the confidence in the decision maker. Consequently, *nemo iudex* and *auctor in rem suam* could be regarded as further arguments in support of the two main propositions advanced by this

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[95] The Institutes of Gaius sets forth this rule as follows: "Because the tutor could not be plaintiff in his own suit [*in re suam auctor*] another was appointed under whose authority it was necessary to carry on the suit." (Gaius 1.184, in Frederick Tomkins and William G. Lemon, *transl*., *The Commentaries of Gaius* (London: Butterworths, 1869) 183.

[96] John Blackie, "Enrichment and Wrongs in Scots Law" (1992) Acta Juridica 23 at 43.

[97] John Erskine, *An Institute of the Law of Scotland: In the Order of Sir George Mackenzie's Institutions of That Law*, vol. 1 (Edinburgh: John Bell, 1773) 123, emphasis added. Later, the courts confirmed that *auctor in rem suam* applied universally to any fiduciary. See *Aitken v Hunter* (1871) 9 M 756 at 762 per Lord Neaves ("It appears to me that from first to last the rule of the law of Scotland has been that any one holding a fiduciary character, whether that of guardian or trustee, cannot lawfully become *auctor in rem suam*… That doctrine is derived from the civil law… It is a sacred rule.").

[98] Patrick Fraser, *A Treatise on the Law of Scotland Relative to Parent and Child and Guardian and Ward*, 2nd ed. (Edinburgh: t. & T. Clark, 1867) 279 ("A principle applicable to all offices of trust of this kind, and more especially of guardianship, is this, that the person acting with such deputed power… shall not be *auctor in rem suam*… It is just as incompetent for him to do this as it would be for a person to be judge in his own cause."). See also James Avon Clyde, transl., *The Jus Feudale by Sir Thomas Craig of Riccarton*, vol. 1 (Edinburgh: William Hodge, 1934) 292 ("It is a principle which knows no exception that no man can make the law to suit himself [*nemo sibi jus dicere*] or be the author of his own rights [*nemo sui juris auctor esse potest*]").

paper, namely that (i) the rules against conflicts of interest in fiduciary and administrative law have common origins and serve analogous purposes, and (ii) both rules are mainly procedural and instrumental, in the sense of promoting the likelihood of accurate outcomes by removing risks of defective or unreliable decision-making processes.

The following sections will highlight the main features of the two conflict of interest rules, and emphasise their main substantive similarities: centrality of judgment and discretion; an aim to protect the public confidence by prohibiting objectionable appearances of conflict; and the use of a reasonable possibility of conflict test to identify apparent or potential conflicts of interest. The comparison shows that the justification for the rule against bias recognises explicitly the connection between self-interest or other vitiating factor and unreliability of judgment, an insight that is nearly absent from fiduciary law. The fiduciary no-conflict rule, in contrast, is bedevilled by a mistaken understanding of the notion of conflict of interest. The tendency to focus on the opposition of interests between the fiduciary and the beneficiary, as opposed to interference of vitiating interest with reliability of judgment and thus accuracy of decisions, obscures the rationale for the strictness of the rule, and enables an argument for relaxation to be developed. It is submitted that, in light of the multiple similarities between the two rules, a deeper understanding of the relation between interest and judgment, similar to that exiting in public law, could bring more coherence into the fiduciary law conceptual framework, as well as a renewed appreciation of the importance of the traditional strictness of the no-conflict rule.

4 The rule against bias

The rule against bias posits that a decision-maker must not be influenced by interest, prejudice or partiality in reaching his decision. In other words, not only must the decision-maker not benefit himself, he must not harbour strong preconceived views about the decision at hand, and must not favour one party or disfavour the other.[99] These negative states of mind are encapsulated in the concept of bias. At the outset, it should be noted that the literature on the rule against bias is much less concerned with the decision-maker's opportunism or temptation to promote his own interest, financial or otherwise, at the detriment of the subjects of this discretion, compared to the literature on the fiduciary no-conflict rule. At common

[99] Michael Supperstone, James Goudie and Paul Walker, *Judicial Review*, 4th ed (London: LexisNexis, 2010) 436.

law, it was laid down that bias was not to be presumed in a judge, who swore to administer impartial justice.[100] The fair-minded and informed observer, who is called upon to evaluate an apparent bias, is aware of the fact that decision-makers are often under oath to respect the law, and are subject to strict ethical and professional standards of conduct.[101] Although these safeguards are not sufficient to exclude all legitimate doubt, the default assumption is that "[t]here is usually no reason to suspect a breach of any obligation by anybody."[102] Consequently, concern with deliberate fraud, opportunism and self-serving temptations fades into the background. A situation of apparent bias becomes objectionable mainly because of the potential tug, often subconscious, that the vitiating factor may have on the decision-maker's mind. This allows for a clearer link to be developed between exercise of discretion and judgment, which is the central function of the decision-maker, and intruding extraneous considerations. In contrast, as discussed below, the mainstream view on fiduciary duties stresses the decision-maker's temptation to abuse his position, thus obscuring the intimate link between self-interest and risk of unreliable (albeit honest) judgment.

4.1 The concept of bias

Bias is a state of mind that renders a decision-making process less reliable. Courts have consistently described bias as a factor, predisposition or attitude of mind[103] unconnected with the merits of the issue[104] that interferes with the decision-makers' identification and evaluation of relevant evidence and considerations.[105] The biasing factor tilts the decision in

[100] William Blackstone, *Commentaries on the Laws of England (1768)* (Buffalo: William S. Hein, 1992) 361; *Brooks v Earl of Rivers* (1668) Harders 503 (chamberlain of Chester not disqualified from hearing action in which his brother in law was a party).
[101] Auburn et al (n 9) at 8.52; 8.59.
[102] John Gardner, "The Mark of Responsibility (With a Postscript on Accountability" in Michael W. Dowdle and Michael W Dowdle, eds, *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) 220 at 241
[103] *Re Medicaments and Related Classes of Goods (No 2)* [2001] WLR 700 per Phillips LJ ("Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve.") See also *R v S* [1997] 3 SCR 484, (1997) 151 DLR. (4th) 193 at 227 (the Supreme Court of Canada defined bias as "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues").
[104] *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 at [28] per Scott-Baker LJ (Bias is "a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue").
[105] See *R v Bertram* [1989] OJ No 2133 (QL) (Bias "represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case").

favour of one of the parties, or inhibits the decision-maker from evaluating relevant evidence with an open mind.[106]

The human mind is prone to a multitude of errors of reasoning that could lead to false outcomes and unfair treatment.[107] Not all errors of reasoning or factors external to the merits of the case fall within the ambit of the rule against bias. What amounts to a biasing factor is a contextual matter, fixed demarcations being futile as well as dangerous.[108] When an impermissible factor arises, it either actually influences a decision or judgment, or it is perceived to pose such a risk. The distinction between the impermissible factor and the biasing effect is critical. The existence of the factor must be proved as a fact on the balance of probabilities, but its operative biasing effect is presumed.[109]

A decision may always be invalidated if actual bias on the part of the decision-maker is proved.[110] Actual bias is a predisposition, based upon fear, affection, favour or ill-will, to decide in a particular way, rather than upon a proper and balanced consideration of the true merits of the issue.[111] Actual and conscious bias automatically disqualifies[112] and may not be capable of waiver.[113] Proof of actual bias, however, is likely to be very difficult,[114] short of an admission of fault by the decision-maker or an express public statement of bias. Even when an express admission is available, it is likely to be disregarded, since courts are not bound to accept any such statements at face value.[115] Moreover, judges cannot be compelled

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[106] *R v Gough* [1993] 2 WLR 737 (A biased decision-maker "might unfairly regard with favour or disfavour the case of a party to an issue under consideration"). *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 at [23], per Lord Hope ("[I]mpartiality consists in the absence of a predisposition to favour the interests of either side in the dispute.").

[107] More extensive research in cognitive biases exist in relation to sentencing. See Catherine Fitzmaurice and Kenneth Pease, *The Psychology of Judicial Sentencing* (Manchester: Manchester Univerity Press, 1986) ch 2; Galligan, *supra* note 8 at 440.

[108] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [25]. *Locabail* distinguished between three categories of factors. First, personal characteristics such as religion, ethnic or national origin, gender, age, class, means or sexual orientation, are never causes of bias under the rule. Second, factors that would "hardly ever" support a claim of bias include membership of professional, sporting or charitable associations, extra-judicial writings, political or social or educational background. Third, factors that would ordinarily support a claim of bias include family connections, personal friendships and dislikes, and any close professional relationships. (*ibid*. at [78]).

[109] *Orange Communications Limited, Plaintiff, v The Director of Telecommunications Regulation* [2000] 4 IR 159 at 241.

[110] See e.g. *R v Burton ex p Young* [1897] 2 QB 468 at 471; *O'Reilly v Mackman* [1983] 2 AC 237; Andrew P. Le Sueur *et al*., *Principles of Public Law*, 2nd ed. (London: Cavendish Publishing, 1999) 279. The rule against actual bias applies to all decision-makers, judicial or administrative (Auburn et al (n 8) at 8.17)

[111] Supperstone et al. (n 99) at 435.

[112] O'Reilly v Mackman [1983] 2 AC 237; R V Gough [1993] AC 646; Laker Airways Inc v FLS, Aerospace Ltd [2000] 1 WLR 113. Supperstone et al. (n 99) at 437.

[113] R v Home Secretary, ex parte Fayed [2001] Imm AR 134.

[114] *Porter v Magill* [2002] 2 AC 357 at 489 per Lord Hope.

[115] *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 at [39], per Lord Cullen; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 477-478.

to give evidence as to the considerations that they took into account in reaching decisions.[116] An obligation to give evidence would be inconsistent with the policy of expressing all pertinent reasons within a self-contained opinion.[117] A decision where a sufficiently serious possibility of bias has been established may be quashed without the need to investigate further the existence of actual bias.

Pecuniary interest in the outcome of a decision, which is the main concern of the fiduciary no-conflict rule, is, under the rule against bias, a factor that triggers automatic disqualification. The rule of automatic disqualification for financial interest has a long lineage in British law. In *Dimes v Grand Junction Canal*, the House of Lords held that the Lord Chancellor was disqualified due to the considerable shareholding in one party to the proceedings. Although the Chancellor's integrity was not doubted,[118] the rule that no one is to be a judge in his own cause (which includes having a financial interest in a party to the proceedings), was "held sacred"[119] and applied strictly. The rule was held sacred for many years, in the sense that the 'smallest' or 'slightest' direct pecuniary interest was sufficient to disqualify automatically, as it diminished the public confidence in the ability of the decision-maker to decide the case purely on its merits.[120]

Over time, however, this rigid concern with removing any suspicion of impropriety was relaxed. A *de minimis* exception was introduced, which excludes financial interests that cannot realistically be regarded as interfering with the decision-making process and outcome.[121] The recognition of this *de minimis* exception highlights that the main concern of prohibiting financial self-interest is the likelihood of such an interest interfering with the reliability and trustworthiness of decision-making process, rather than trust in the public office *tout court*. Thus, automatic disqualification too turns on the possibility that the judge's decision process may be affected, or perceived to be affected, by his interest.[122] As a result, commentators increasingly question whether there is any need for the doctrine of automatic disqualification, arguing that cases where it applies would be better considered under the test

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[116] *Rondel v Worsley* [1969] 1 AC 191 at 249, per Lord Morris of Borth-y-Gest (HL). *Giannarelli v Wraith* (1988) 165 CLR 543 at 574, per Wilson J.
[117] Goudkamp (n 12) at 313.
[118] "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern" (*Dimes v Grand Junction Canal* (1852) 3 HL Cas 759 at 793, per Lord Campbell).
[119] *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759 at 785.
[120] *R v Rand* (1866) LR 1 QB 230 at 232; *R v Camborne Justices ex p Pearce* [1954] 2 ALL ER 850 at 853.
[121] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [8]-[10].
[122] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 3rd Ed (London: Sweet & Maxwell, 2013) 3.97.

for apparent bias, which links impermissible factors with the decision-making process.[123] Some have argued that disqualification for interest and disqualification for bias effectively converged into one strand, with no significant differences between presumed bias and the test of a real likelihood or possibility of bias.[124] This de facto convergence recognises that the key question in a claim of bias is not the form an interest might take but the effect it might have on the decision-making process.[125] This is essential for understanding the instrumentalist account of the purpose of the rule against bias: the core concern of this rule is the effect of the impermissible factor on the decision-making process and thus on the accuracy of the decision. Protection of higher-order values, such as respect of the autonomy and dignity of the subjects of the discretion is also an important objective, but it is one that the rule against bias serves indirectly, as part of a broader set of procedural safeguards.[126]

4.2 The test for apparent bias

Given the difficulties of establishing the existence of real or actual bias, and of measuring its adverse effects on the decision-making process, bias law focuses on the appearance of bias. Various tests have been developed to establish the limits beyond which the appearances of bias become reprehensible.[127] The initial test, based on suspicion of bias was very strict. An extreme version of this test held that judges must be free from even unreasonable suspicions of bias.[128] The more established form of the suspicion test was that of a reasonable suspicion of bias.[129] It was based on the famous passage in *R v Sussex Justice ex p McCarthy*, where

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[123] *De Smith* (n 80) at 10-32 – 10-36; Auburn et al (n 8) at 8.24; Goudkamp (n 12) at 314. Australian law rejects the proposition that pecuniary could be treated differently or lead to automatic disqualification. *Ebner v Official Trustee* (2000) 205 CLR 337 at 356-357.

[124] Zuckerman (n 122) at 3.96-3.97. This is the case in Australia. In *Ebner v Official Trustee* (2000) 205 CLR 337 the majority of the High Court of Australia argued that, upon close reading, *Dimes* did not support automatic disqualification, and rejected the proposition that pecuniary and other interests could or should be treated differently, or that the latter should lead to automatic disqualification (*ibid* at 355-357). It is also the case in Canada, where the Supreme Court held that disqualification rests either on actual bias or on the reasonable apprehension of bias, both of which require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person (*Wewaykum Indian Band v Canada* [2004] 2 LRC 692 at 711).

[125] Groves (n 7) at 508-509.

[126] Galligan (n 8) at 93-95.

[127] *De Smith* (n 80) at 504-508. The rule against apparent bias applies to both judicial and administrative decision-makers (Auburn et al (n 8) at 8.40). Traditionally, this rule had a more limited ambit when applied in administrative contexts. This is no longer the case, in light of art 6(1) of the European Convention of Human Rights, which states that, when determination of civil rights and obligations or of any criminal charge are at stake, every person is entitled to an independent and impartial tribunal.

[128] *Eckersley and Others v The Mersey Docks and Harbour Board* [1894] 2 QB 667 at 671, per Lord Esher, MR.

[129] See *R v Gainsford* [1892] 1 QB 381; *Cooper v Wilson* [1937] 2 KB 309; *Metropolitan Properties Co (FCG) Ltd v Lannon* [1969] 1 QB 577.

Lord Hewart CJ stated that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done… Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."[130]

In *R v Gough*, Lord Goff of Chieveley argued that it was unnecessary to have recourse to a test based on mere suspicion or reasonable suspicion, for the purpose of ensuring that justice is seen to be done.[131] He proposed instead a test based on "a real likelihood, in the sense of a real possibility, of bias" on the part of the decision-maker.[132] Lord Woolf explained that examining the existence of bias beyond a real likelihood is neither desirable nor useful because "courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect."[133] Moreover, as Lord Goff explained, the decision-maker's good faith belief that he is acting impartially is irrelevant: bias is an "insidious thing" that may unconsciously affect the mind of the decision-maker.[134]

The "reasonable likelihood of bias" standard did not carry the day. In *Re Medicaments and Related Classes of Goods (No 2)* the English Court of Appeal adjusted the test to a "reasonable apprehension of bias", which was more consistent with the requirements of European law.[135] The House of Lords endorsed this adjustment in *Porter v Magill*, and linked it with the fair minded observer who takes account of the circumstances of the case at hand.[136] The fair-minded observer is assumed "to have access to all the facts that are capable of being known by members of the public generally".[137] The decision in *Porter* did not, however, provide any significant guidance on how much the fair minded observer should be taken to know,[138] and became subject to criticism from courts[139] and commentators.[140]

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[130] See *R v Sussex Justices Ex p. McCarthy* [1924] 1 KB 526 at 529, per Hewart C.J.
[131] *R v Gough* [1993] AC 646 at 668.
[132] *Ibid*.
[133] *Ibid*. at 673.
[134] *Ibid*. at 659. See also *De Smith* (n 80) at 278 ("[B]ias can operate even though the individual concerned is unaware of its effect").
[135] *Re Medicaments and Related Classes of Goods (No 2)* 62 [2001] 1 WLR 700 at 726-727.
[136] *Porter v Magill* 6 [2002] 2 AC 357.
[137] *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 All ER 731 at [17].
[138] Groves (n 7) at 497.
[139] *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [2008] 1 WLR 2416 at [1] per Hope LJ (the fair-mined observer "has attributes which many of us might struggle to attain to"). In Australia, Kirby J noted that the fiction of the fair-minded observer had "been stretched virtually to snapping point" (*Smits v Roach* (2006) 227 CLR 423 at 457 [96]).
[140] See e.g. Abimbola Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to Gough' *Cambridge Law Journal* 68 (2009) 388 at 388 ("If one were to attempt to describe the attributes of the Archangel Michael, one could not do much better"); Holly Stout, "Bias" *Judicial Review* 16 (2011) 458 at 461 (observing that the knowledge and power of reasoning imputed to the fair-mined observer are too sophisticated,

Notwithstanding these controversies and continuing uncertainties, the *Porter* test reinforces the connection between public confidence and the risk of compromised decision-making process highlighted in *Gough*. As the House of Lords stated in *Lawal v Northern Spirited Ltd*, the "public perception of the possibility of unconscious bias is the key".[141] The test is met when appearances lead to a reasonable inference that extraneous factors may have influenced the decision process, as opposed to investigating "what is in the mind of the particular judge or tribunal member who is under scrutiny."[142]

This insight into the effect of bias on the decision-maker's mind is essential for understanding the purpose of the rule against bias, irrespective of the actual wording of the test for apparent bias. The concern with the insidious effects of extraneous factors appears in numerous other decisions. In *R v Barnsley Licensing Justices*, Devlin LJ commented that "[b]ias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."[143] Bias is hard to detect and measure because it interferes, unconsciously, with the proper identification and weighing of relevant and irrelevant considerations. In *R v Inner West London Coroner*, Sir Thomas Bingham explained that bias creates the risk "of having caused the decision-maker, albeit unconsciously, to weigh the competing considerations, and so to decide the merits, unfairly."[144] In *Locabail*, Lord Bingham CJ explained that bias calls into question the decision-maker's ability "to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him."[145]

Coupled with a default assumption of probity and honesty,[146] the insight that extraneous factors (including material self-interest) may tug subconsciously on the decision-maker's mind evidence a core concern with the quality of the decision-making process, rather

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often relating to legal procedures and technicalities); James Goudkamp, 'Apparent Bias: Helow v Secretary of State for the Home Department' *Civil Justice Quarterly* 28 (2009) 183 at 187 (arguing that the perception of the sophisticated fictitious observer is markedly different that of the ordinary member of the public, which weakens the ability of the rule against bias to protect the public confidence in the administration of justice); Saima Hanif, 'The Use of the Bystander Test for Apparent Bias' *Judicial Review* 10 (2005) 78 (the *Porter* test risks becoming nothing more than a façade of objectivity, behind which courts can impose their personal and subjective interpretation of what amounts to a reasonable apprehension of bias). An in-depth review of these critiques is beyond the scope of this paper.

[141] *Lawal (Appellant) v Northern Spirited Ltd* [2003] UKHL 35 at [14].

[142] *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006], 1 All ER 731 at [17], per Lord Hope.

[143] *R. v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at 187.

[144] *R v Inner West London Coroner, Ex p Dallaglio* [1994] 4 All ER 139 at 152.

[145] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at para. 25.

[146] See nn 100 - 102 above and the associated text.

than with the decision-maker's actual motives or with the level of trustworthiness that the public office inspires more generally. Thus, the rule protects the integrity of the decision-making process and, indirectly, maintains the public confidence in the administration of justice. Whether these two outcomes are on equal footing or one is subordinated to the other is a matter of debate between the dignitarian and instrumentalist accounts.[147] The first one views the rules on procedural fairness (including the rule against bias) as serving fundamental rights, values or ideals existing beyond the outcome of the decision-making process (such as the right to be treated with dignity and respect, a basic principle of non-arbitrariness, or the right to individual security). In this view, accuracy of procedures and outcomes is a prudential or derivative value, serving higher, first-order fundamental values.[148] The second school of thought links procedural fairness with the quality of the outcome of the decision-making process, and emphasises the importance of accuracy of this process. Galligan argued that the two approaches and rationales are in fact compatible. Adequate decision-making procedures ensures accuracy of decisions, which in turn promotes a multitude of first-order values. The ultimate objective of fair treatment and public confidence in the justice system is served by a cluster of values and standards of different kinds, each of which having a specific contribution. The specific contribution of the rule against bias is increased likelihood of accurate decisions, which in turn ensures that person's rights and other normative expectations created by law should be respected.[149]

5 The fiduciary no-conflict rule

As the previous section showed, the rule against bias in public law is justified on the ground that bias or personal interest creates a risk that extraneous factors will be taken into account or will otherwise subconsciously skew the outcome of the decision-making process. The difficulty of detecting the extent of the influence of such factors is so great that a strict general rule insisting on evidence of a risk of partiality is justified. Thus, given the difficulty in detecting the error or distortion in the outcome of the judgment process, public confidence demands procedures which depend on proving not actual bias but the reasonable appearance of it. The key insight of this account is that the objective of promoting public confidence cannot be understood in isolation from the objective of ensuring accuracy of the decision-

[147] A detailed evaluation of this debate is not necessary for the purposes of this paper.
[148] See e.g. J. Mashaw, *Due Process in the Administrative State* (Yale, Newhaven, Conn., 1985) 158.
[149] Galligan (n 8) at 78, 95.

making process. Public confidence in the accuracy of procedures depends not on the guarantee that they lead in each case to the right outcomes, since that would be difficult to assess. Public confidence, instead, relates to the procedures being conducive to accurate results.[150]

5.1 The concept of fiduciary conflict of interest

As discussed in sections 2 and 3 above, the rule against bias and the fiduciary no-conflict rule share many commonalities, from a core objective of excluding vitiating considerations from the exercise of discretion, to potential joint historical roots. A point where the two doctrines seem to diverge is the dominant understanding of the purposes of these rules. While the rule against bias is generally justified as one of the safeguards of the decision-making process, the dominant justification for the fiduciary rule is the need to deter and discourage fiduciaries from abusing their position or from breaching their duties. As this section will show, the dominant, deterrence-based account of the purpose of the no-conflict rule is flawed for several reasons. First, by failing to connect self-interest with the core feature of exercise of discretion over the interests of others, the deterrence account is unable to provide a satisfactory explanation of why the no-conflict rule applies only in certain contexts (ie fiduciary relations) but not in similar contexts where one person has access to another's assets and thus the opportunity to abuse his role at the expense of another (ie the cases of bare trustees, bailees, execution-only agents, bankers or mortgagees). Second, it struggles to explain why the good faith of the decision-maker or the absence of ostensible loss to the other party are irrelevant to the issue of liability, when a potential conflict of interest arises.[151] The analogy with the rule against bias suggests that a different understanding of the notion of conflict of interest, namely as interaction between interest and decision-making process (as opposed to conflict between two diverging interests) is a more cogent foundation for understanding the purpose of the strict fiduciary duties.

Fiduciary law does not normally use the notion of bias, with a few exceptions. In *Parker v McKenna*, for example, Lord Cairns LC stated that it is "utterly impossible" for

[150] Galligan (n 8) at 72.

[151] For an in-depth critique of the deterrence accounts see Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations, *Journal of Equity* 7 (2013) 87 at 90-95. Smith argued that it is implausible to regard the no-conflict and no-profit rules as being designed to fulfil a deterrent role since "[n]o one designing a deterrent sanction would ever set the level of the sanction as the forfeiture of the precise amount of the supposedly wrongful profit" (*ibid*. at 92).

directors having a conflict of interest "to exercise an independent and unbiased judgment".[152] In *Movitex v Bulfield,* Vinelott J stated that a company has the right to the benefit of the "unbiased judgment" of its directors.[153] The traditional and dominant way in which the fiduciary no-conflict rule is defined relies on the opposition between fiduciary's impermissible interest and the interests of the beneficiary. This 'conflicting interests' account of the no-conflict rule is inveterate. It goes back to the decision in *Aberdeen Railway Co v Blaikie Brothers*, where Lord Cranworth referred to the possibility of conflicting interests as sufficient to trigger fiduciary's liability:

> "[I]t is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."[154]

The subsequent case law and literature on fiduciary conflicts of interest are marked by imprecise and inconsistent language.[155] In a loose, but frequent formulation, the term conflict of interest is used to refer to situations in which the fiduciary's personal interest and the interest of the beneficiary point in opposite directions.[156] In a more precise approach, a conflict of interest is understood as the opposition between the fiduciary's personal interest and his core duty to exercise judgment based on relevant considerations.[157] More often, however, the duty side of the conflict of interest is interpreted broadly, as encompassing all other duties that a fiduciary owes to the beneficiary.[158] Consequently, although it refers to a conflict between interest and duty, this understanding of a conflict of interest is very similar to the conflicting interests approach: the conflict is between the fiduciary's self-interest and his duty to the beneficiaries.

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[152] *Parker v McKenna* (1874) LR 10 Ch App 96 at 118.
[153] *Movitex Ltd v Bulfield* [1988] BCLC 104 at 118.
[154] *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 at 471-472.
[155] For a detailed analysis of the imprecise language see Valsan (n 1) at 15-26.
[156] Paul B Miller, 'Justifying Fiduciary Remedies' *University of Toronto Law Journal* 63 (2013) 570 at 605; Irit Samet, 'Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule' *Oxford Journal of Legal Studies* 28 (2008) 763 at 765; Tamar Frankel, 'Fiduciary Law' *California Law Review* 71 (1983) 795 at 811.
[157] Valsan, *supra* note 1.
[158] See e.g. Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Portland: Hart, 2010) at 247, 249. For critiques of Conaglen's theory see Smith (n 152); Paul Miller, 'Justifying Fiduciary Duties' (2012) 58:4 McGill Law Journal 970; Rebecca Lee, 'In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis' (2007) 27 Oxford Journal of Legal Studies 327.

This account of the no-conflict rule is unsatisfactory and imprecise, because it does not connect the strict no-conflict rule with a core feature of the fiduciary relationship. In other words, it does not explain why this rule binds fiduciaries and not other persons, who may equally be tempted to promote their own interests, and have opportunities to do so at the expense of others. Examples of such situations include bare trustees, bailees or execution-only agents, or providers of certain services such as mechanics or builders. The public law understanding of the rationale of the rule against bias could be instructive in this respect. As mentioned in the previous sections, the public law rule makes a stronger connection between impermissible external factor and risk of inaccurate decision-making process. This insight could easily be fitted into fiduciary law theory, by highlighting the importance of the discretionary power element of a fiduciary relation.

Fiduciary law recognises, albeit insufficiently, the discretionary power to affect the legal or practical interests of another as a fundamental characteristic of fiduciary relationships.[159] Weinrib, one of the first authors to engage in a general analysis of fiduciary obligations, emphasised that discretion is a core element in fiduciary law:

> "[F]iduciary obligation is the law's blunt tool for the control of… discretion… Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary must have scope for the exercise of discretion, and second, this discretion must be capable of affecting the legal position of the principal."[160]

In *Galambos v Perez*, the Supreme Court of Canada stressed that "[t]he particular relationships on which fiduciary law focuses are those in which one party is given a discretionary power to affect the legal or vital practical interests of another."[161] The discretionary fiduciary power gives its holder scope for judgment on how to promote the best interests of the beneficiary.[162] The importance of undertaking and discretion has been restated

[159] Valsan (n 1) at 7-8. See also see Lionel Smith, 'Contract, Consent and Fiduciary Relationships' in Paul Miller and Andrew Gold, *Contract, Status and Fiduciary Law* (Oxford: Oxford University Press, 2016) 117 at 117; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 Law Quarterly Review 608 at 610; Evan J. Criddle, 'Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking', *Texas Law Review* 88 (2010) 441 at 470; Evan Fox-Decent, 'Fiduciary Authority and the Service Conception' in Gold and Miller (n 58) 363 at 381

[160] Ernest Weinrib, 'The Fiduciary Obligation' *University of Toronto Law Journal* 25 (1975) 1 at 4. See also Conaglen (n 166) at 247 ("It is difficult to imagine fiduciary relationships that do not involve some element of discretion on the fiduciary's part").

[161] *Galambos v Perez* [2009] 3 SCR 247 at [70].

[162] Paul B Miller, 'A Theory of Fiduciary Liability' *McGill Law Journal* 56 (2011) 235 at 275; Remus Valsan, 'Fiduciary Duties of Credit Brokers: *McWilliam v Norton Finance*' *Edinburgh Law Review* 20 (2016) 99 at 103.

more recently in another unanimous decision of the Supreme Court of Canada. In *Alberta v Elder Advocates of Alberta Society*, McLachlin C.J., writing for the Court, stated that, in order for ad hoc fiduciary duties to be imposed, the following elements must be present: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[163]

Linking the no-conflict rule with the core feature of discretionary power provides a more accurate understanding of the rationale and purpose of the fiduciary no-conflict rule, along the lines of the rationale of the public law rule against bias.

5.2 The test for potential conflicts of interest

Subsequent interpretations and elaborations of the no-conflict rule retained, in general, the language of conflicting interests used in *Aberdeen Railway*. In *Boardman v Phipps*, a central issue was the definition of potential conflicts of interest, building on the "possibly may conflict" wording in *Aberdeen Railway*. Lord Hodson asserted that a fiduciary is liable to disgorge the profits whenever there was a mere possibility, even remote, that the fiduciary's self-interest might conflict with his duty of loyalty: "even if the *possibility* of conflict is present between personal interest and the fiduciary position the rule of equity must be applied."[164] In contrast, Lord Upjohn, dissenting, took the view that a fiduciary should be compelled to disgorge the profits only where there has been a "real sensible possibility" of conflict of interest. In the circumstances, he considered that a possibility of conflict was too remote to render the alleged fiduciary liable:

> The phrase 'possibly may conflict' requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.[165]

[163] *Alberta v. Elder Advocates of Alberta Society* [2011] 2 S.C.R. 261 at [36].
[164] *Boardman v Phipps* [1967] 2 AC 46 at 111, emphasis added.
[165] *Ibid*. at 124, emphasis added.

Lord Upjohn's view prevailed.[166] In order for a fiduciary potential conflict of interest to exist, there must be a reasonable possibility of such conflict in the eyes of the reasonable man, not merely an appearance.[167] His description of the potential conflict of interest, however, did not discuss what a situation of conflict of interest consists of, thus implicitly endorsing the 'conflicting interests' approach from *Aberdeen Railway*.

A related feature of the no-conflict rule is that its application is strict. There are several aspects to this strictness. Liability for breach of fiduciary duty does not depend on the fiduciary's good faith or actual motives, on the fact that the beneficiary has suffered no loss or has obtained a benefit following the conflicted transaction, or on the fact that the opportunity that the fiduciary has taken for himself was no longer available to the beneficiary. In *Regal (Hastings) Ltd v Gulliver*, Lord Russell underlined the irrelevance of these factors for finding a breach of the proscriptive duties:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as to whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intended, cannot escape the risk of being called upon to account."[168]

As this section shows, the fiduciary test for a potential conflict of interest and the public law test of apparent bias are substantively similar: they use the standard of the reasonable informed observer to determine whether a potential personal interest that the decision-maker

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[166] Although Lord Upjohn's definition of a potential conflict of interest is dominant, it is not universally accepted. See e.g. Robert Pearce and Warren Barr, *Pearce & Stevens' Trusts and Equitable Obligations*, 7th ed (Oxford: Oxford University Press, 2018) 701.

[167] See *Marks and Spencer plc v Freshfields Bruckhaus Deringer* [2004] 3 All ER 773 at 777: *"*The cases establish that the potential conflict must be a reasonable apprehension of a potential conflict, not a mere theoretical possibility." See also Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Canada Ltd, 2005) 918.

[168] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134 at 144, emphasis added. See also *Bray v. Ford* [1896] AC 44 at 51, per Lord Herschell, underlining the irrelevance of good faith: "[The profit and conflict rules] might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing."

has in his exercise of discretion is sufficiently problematic to attract the application of the respective rules. In contrast with the rule against bias, which appears to make a clearer link between the potential influence on the interest on the accuracy of the decision-making process, the fiduciary standard seems to focus on the degree of opposition between the fiduciary's personal interest, actual or potential, and the interest of the beneficiary. As the next section shows, this understanding is problematic.

5.3 The purpose of the fiduciary no-conflict rule

The idea that conflict of interest is concerned with the effect of personal interests on fiduciary's judgment is not altogether absent from fiduciary law literature. It was recognised in early cases and texts.[169] Unfortunately, commentators and judges have lost sight of this conception of conflicts of interest, as the policy justification of preserving the strictness of fiduciary duties in order to deter temptations of abuse gained primacy. This justification highlights the need to promote public confidence in fiduciary relationships by discouraging fiduciaries from being tempted to seek unauthorised benefits, and overcoming the evidentiary difficulties that courts could face in trying to uncover the existence or the extent of fiduciary wrongdoing.[170] The focus on public confidence and removal of temptation led some scholars to argue for a more relaxed application of the fiduciary no-conflict and no-profit rules, where the fiduciary acted in good faith and the decision or transaction was ostensibly for the benefit of beneficiaries.[171]

One strand of the argument is that the evidentiary difficulties reason traditionally invoked in support of the strict fiduciary duties is outdated. This reason for the strict fiduciary duties holds that it is difficult for the court to discover the background and facts of a conflicted transaction and much time would have to be spent in assessing whether the

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[169] For a detailed discussion see Valsan (n 1) at 15-24.

[170] Valsan (n 1) at 11-14. Robert Flannigan, 'The Strict Character of Fiduciary Liability' *New Zealand Law Review* (2006) 209 at 217; Tamar Frankel, 'Fiduciary Duties as Default Rules' *Oregon Law Review* 74 (1995) 1209 at 1223-1225. Paul D. Finn is one of the most prominent proponents of public policy explanations of the strict fiduciary duties. He argued that the fiduciary principle is "an instrument of public policy, [which] has been used, and it is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in society. And it is used to protect interests, both personal and economic, which the society deems valuable… [A]s perceptions of social interests and values change so also can the ambience of the fiduciary principle itself." (Paul D. Finn, 'The Fiduciary Principle' in T.G. Youdan, *Equity, Fiduciaries and Trust* (Toronto: Carswell, 1989) 1 at 26).

[171] Criticism of the rigid application of fiduciary rules is commonly directed at the no-profit rule. Whether the no-conflict and no-profit rules are entirely separate is a hotly debated issue in fiduciary law. The general view, to which this paper subscribes, is that unauthorised benefits are simply an instance of impermissible interests, and thus fall within the broader no-conflict rule.

transaction was fair.[172] In *Murad v Al-Saraj*,[173] for instance, Arden LJ stated, in obiter, that whilst evidentiary difficulties relating to breach of the no-profit rule would have been relevant many decades ago, modern courts do not face such problems. She argued that the time may have come for courts to "revisit the operation of the inflexible rule of equity in harsh circumstances", and exclude liability when the trustee or other fiduciary has acted in perfect good faith and without any deception or concealment, and in the belief that he was acting in the best interests of the beneficiary.[174] In the same decision Parker LJ made a similar argument for reviewing the harsh application of the no-conflict rule:

> "there can be little doubt that the inflexibility of the 'no conflict' rule may… work harshly so far as the fiduciary is concerned. It may be said… that that is the inevitable and intended consequence of the deterrent nature of the rule. On the other hand, it may be said that commercial conduct which in 1874 was thought to imperil the safety of mankind may not necessarily be regarded nowadays with the same depth of concern. So, like Arden LJ… I can envisage the possibility that at some time in the future the House of Lords may consider that the time has come to relax the severity of the 'no conflict' rule to some extent in appropriate cases."[175]

Sealy argued that courts today face "no evidentiary problem"[176] in discovering whether a fiduciary acted against the interests of the beneficiary, whilst Edmunds and Lowry contend that evidentiary hurdles "need not pose any insurmountable obstacles".[177] Jones advocated for courts to decide on liability for breach of the no-conflict rule on an ad hoc basis, in order to help to remove the harsh elements of the fiduciary rules, and ensure that honest and dedicated fiduciaries are not unjustly punished.[178] Similarly, the Scottish Law Commission

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[172] *Aberdeen Railway Co v Blaikie Brothers* (1853) 1 Macq 461 at 472, per Lord Cranworth; *Hamilton v Wright* (1842) 1 Bells App 574 at 591, per Lord Brougham.
[173] *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573.
[174] *Ibid*. at [82]. A few years earlier, she made a similar point in *John Taylors v Masons* [2001] EWCA Civ 2106, [2005] WTLR 1519 at [41], where she commented that "it may be that in the current day and age such a rule is too harsh for modern circumstances".
[175] *Ibid*. at [121]. 1874 and "the safety of mankind" are references to *Parker v McKenna* (1874) LR 10 Ch App 96 at 124-125, per W. M. James LJ. This expression was used by older fiduciary cases. See e.g. *Ex parte Bennett*, (1805) 10 Ves Jun 382 at 385-396, where Lord Eldon commented that the fiduciary no-conflict rule does not depend on proof of an actual benefit accruing to the fiduciary because "if a trustee can buy in an honest case, he may in a case, having that appearance; but which from the infirmity of human testimony may be grossly otherwise… Under such circumstances, the safety of mankind requires the court to act upon general principle.").
[176] Len S Sealy, *Company Law and Commercial Reality* (1984) 40.
[177] R Edmunds and J Lowry, 'The No Conflict - No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism' *Journal of Business Law* (2000) 122 at 139. See also S Panesar, 'The Nature of Fiduciary Liability in English Law' *Coventry Law Journal* 12 (2007) 1.
[178] Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' *Law Quarterly Review* 84 (1968) 487.

stated that a potential option for reform of trustees' fiduciary duties would be for courts to relax the fiduciary rules "on a case-by-case basis".[179] In a subsequent report, the Commission recommended a joint-interest approach to trustees' fiduciary duty, whereby the court could exonerate a trustee from liability for breach of fiduciary duty if the trustee acted honestly in the interests of the trust and the transaction was fair.[180] Langbein put forward a similar proposal in the context of US trust law.[181] He averred that "a revolution in fact-finding" reduced the concerns regarding concealment of trustee misbehaviour, implying that the evidentiary-based justification is no longer powerful.[182] Consequently, the no further inquiry rule[183] must be replaced with a regime that allows trustees to retain profits obtained from their position, as long as they can prove, if challenged in court, that the conflicted transaction was prudently undertaken in the beneficiary's best interest.[184]

These arguments for relaxing the strict no-conflict fiduciary rule are plausible if the notion of conflict of interest is understood as 'conflicting interests', namely opposition between the individual interests of the fiduciary and the beneficiary. In such an approach, it is reasonable to argue that a rule imposing liability when a potential conflict of interest arises, irrespective of the fiduciary's good faith or intention to benefit the beneficiary (as it was the case in many foundational fiduciary cases, such as *Aberdeen Railway*,[185] *Regal Hastings*,[186] or *Boardman*[187]) may be anachronistic and unduly harsh. When conflict of interest is regarded as a situation where personal interest creates a risk of unreliable judgment, thus affecting the accuracy of the decision process in ways that are hard to observe or correct, the need to maintain the strict fiduciary rule is easier to comprehend and advocate. In a similar vein, the parallel with the rule against bias brings new insights into the irrelevance of the

[179] Scottish Law Commission, 2003. 'Discussion Paper on Breach of Trust' 37.
[180] Scottish Law Commission, 2014. 'Report on Trust Law' 141.
[181] John H. Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' *Yale Law School Journal* 114 (2005) 929.
[182] *Ibid*. at 954.
[183] The 'no further inquiry' rule makes transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. See The Uniform Trust Code, Section 802 (b), available at https://tinyurl.com/yyv2bb27.
[184] *Ibid*. at 980-981. These calls to relax fiduciary duties have been met with considerable criticism. See e.g. Graham Virgo, *The Principles of Equity and Trusts*, 2nd ed (Oxford: Oxford University Press, 2016) 534; David Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' *Oxford Journal of Legal Studies* 25 (2005) 603 at 621; R Flannigan, 'The Strict Character of Fiduciary Liability' *New Zealand Law Review* (2006) 209 at 235.
[185] Supra (n) 154.
[186] Supra (n) 168.
[187] Supra (n) 165.

decision-maker's good faith and proper motivation: bias is an "insidious thing" [188] that may unconsciously affect the mind of the decision-maker.

6 Conclusion

The dominant fiduciary law view on the purpose of the no-conflict rule explains the prohibition of self-interest mostly as a means to discipline fiduciaries who are tempted to abuse their position for their own benefit. In the public law literature on the rule against bias, in contrast, the prohibition of having a personal interest in the outcome of a decision is linked primarily to the need to ensure that judicial or administrative decision-makers do not stray, consciously or unconsciously, from their core duty to exercise impartial and independent judgment. Although impartiality of judgment is not the main concern of fiduciary law, the essence of the two instances of conflict of interest is ultimately the same: when a duty to decide over the interests of another based on pre-defined standards exists, the interference of personal interests and preferences can alter the decision-making process and cause a breach of this duty.

The two rules have a similar approach to identifying potential or apparent conflicts of interest. The fair-minded informed observer test of apparent bias is remarkably similar to the 'reasonable man looking at the relevant facts and circumstances' test for determining the possibility of a fiduciary conflict of interest. The similarity between the two tests goes beyond mere language. The common language reflects a similar methodology in determining possible conflicts of interest and, respectively, situations of bias. In contrast to the rules against bias, the fiduciary no-conflict rule suffers from an inadequate understanding of a conflict of interest situation. Although discretion is generally recognised as a central feature of a fiduciary relation, the link between interest and discretion is nearly absent. De-coupling the extraneous interest from proper exercise of judgment has the undesirable consequence of making possible the argument that the no-conflict rule should be relaxed by removing fiduciary liability where the fiduciary acted in good faith and the decision or transaction was in the best interests of the beneficiary.

This paper argued that fiduciary law theory could benefit from a more sophisticated understanding of the content and purpose of the no-conflict rule. The fair-minded and informed observer standard applied in judicial review of administrative decisions and the

[188] Supra (n) 134.

justifications for the rule against bias provide useful comparative insights. The public law rule and test acknowledge more clearly the risk of unreliable or impartial decision-making process caused by the interfering impermissible factor. The idea that self-interest interferes with the proper exercise of judgment has been present in the fiduciary law theory and court opinions since the earliest developments of the rules governing fiduciaries. The early references to the prohibition of being judge in one's cause, and the occasional mentioning of the weakness of the human mind to resist the influence of self-interest, suggest that courts may have been aware of the risk of unreliable judgment caused by conflicts of interest and difficulties of proving or measuring this risk. Early in the development of the no-conflict rule, however, the connection between a fiduciary's personal interests and his exercise of judgment in another's interest was overshadowed by 'deterrence' and 'evidentiary difficulties' as principal justifications of the existence and strictness of fiduciary duties. Thus, fiduciary law lost sight of the intimate connection between reliability of judgment and the presence of conflicting interests.